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Cosmopolitanism, Global Justice, and International Law

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Key words

cosmopolitanism; environmental law; Rawls; sovereign equality; world poverty

Along with the exploding attention to globalization, issues of global justice have become central elements in political philosophy. After decades in which debates were dominated by a state-centric paradigm, current debates in political philosophy also address issues of global inequality, global poverty, and the moral foundations of international law. As recent events have demonstrated, these issues also play an important role in the practice of international law. In fields such as peace and security, economic integration, environmental law, and human rights, international lawyers are constantly confronted with questions of global justice and international legitimacy. This special issue contains four papers which address an important element of this emerging debate on cosmopolitan global justice, with much relevance for international law: the principle of sovereign equality, global economic inequality, and environmental law.

The political–philosophical interest in global justice and international law received an important stimulus with the publication of John Rawls’s *The Law of Peoples*.¹ In this book Rawls claims to extend the principles of justice for domestic society to international relations for a society of peoples.² Rawls describes the Law of Peoples ‘as a particular political conception of right and justice that applies to the principles and norms of international law and practice’, and the Society of Peoples as ‘all those peoples who follow the ideals and principles of the Law of Peoples in their mutual relations’.³ Characteristic of Rawls’s approach in both in the domestic and international theory of justice is the use of thought experiments involving a fictional deliberative forum, the *original position*. To ensure that this hypothetical deliberation is fair and equal, the parties in the deliberation exist behind ‘a veil of ignorance’ depriving them of knowledge about themselves, and thus preventing

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1. J. Rawls, *The Law of Peoples* (1999).

2. *Ibid.*, at 3, 9.

3. *Ibid.*, at 3.

them from being biased towards their own interests according to their own social, historical contingency and conception of the good.

There is also, however, an important difference in Rawls's theory between the domestic and the international context. In the domestic context, *individuals* decide behind a veil of ignorance on the basic principles of justice. In the international context, this role is assigned to *representatives of peoples* (or rather states). Moreover, in the domestic context, all citizens have an equal say in the determination of the basic principles of justice of that society. This notion of equality is not applied to peoples or states. Rather, in *The Law of Peoples* Rawls makes an a priori distinction between different types of peoples: reasonable liberal peoples, decent hierarchical peoples, outlaw states, and burdened societies.⁴

Since the Law of Peoples is developed out of, and in line with, his liberal idea of domestic justice, as presented in *A Theory of Justice* and *Political Liberalism*,⁵ it only allows reasonable liberal peoples to decide on the principles that should govern international relations. In this sense, *The Law of Peoples* can be read as a theory of the foreign policies that reasonable liberal states should adopt. Rawls develops the theory in three stages. The first stage identifies the set of principles on which liberal peoples can agree among themselves as the basis of fair co-operation in a society of liberal peoples. Perhaps surprisingly, Rawls suggests that representatives of liberal peoples in the original global position will agree to adopt principles that come close to some basic principles that underlie current international law: the independence and equality of states, the *pacta sunt servanda* principle, the prohibition on intervention, the right of self-defence, and the obligation to honour human rights and justice in war. Moreover, Rawls argues, peoples have a duty to assist burdened societies lacking the resources to sustain just regimes.⁶

In the second stage, the way in which liberal peoples should deal with other types of peoples is set out. Here Rawls argues that liberal peoples should respect and recognize decent hierarchical peoples as 'equal participating members in good standing of the Society of Peoples', but should exclude outlaw states and burdened societies.⁷ In the third and final stage, Rawls addresses the way in which well-ordered peoples (liberal and decent peoples) should deal with outlaw states – states that 'refuse to comply with a reasonable Law of Peoples' – and burdened societies lacking the basic resources to become well ordered.⁸ He describes how well-ordered societies

4. In Rawls's description, *liberal peoples* are governed by reasonable and just constitutional democratic regimes that protect basic rights and liberties of all citizens, prioritizes these rights and liberties over claims of the general good or perfectionist values, and assures for all citizens access to primary goods to enable them to make effective use of their freedoms. *Decent hierarchical peoples* fall short of liberal standards but satisfy two criteria. First, they are peaceful, do not have aggressive aims, and respect the independence of other states. Second, they respect human rights, have a 'decent consultation hierarchy' (the elected bodies represent all the subgroups), and their officials operate in the honest belief that their law is guided by a 'common good idea of justice'. *Outlaw states* are states that refuse to comply with the Law of Peoples. *Burdened societies* are societies whose historical, economic, and cultural conditions make it difficult, if not impossible, to become well ordered on their own. Rawls, *supra* note 1, at 14, 64–5.

5. J. Rawls, *A Theory of Justice* (1971); *idem*, *Political Liberalism* (1993); *idem*, *supra* note 1, at 3.

6. Rawls, *supra* note 1, at 37. Rawls stresses that this set of principles is incomplete and that other principles might be added.

7. *Ibid.*, at 59.

8. *Ibid.*, at 90.

may defend themselves against outlaw regimes and help bring about reform within these regimes in the long run and how they can assist burdened societies to help bring them into the Society of well-ordered Peoples.⁹

Several international lawyers have criticized Rawls's theory (and its adoption in liberal internationalism) as being too exclusive. His emphasis on universal principles, combined with the a priori distinction between states, has reminded international legal scholars of the logic of inclusion and exclusion that underlay many nineteenth-century conceptions of international law. In those conceptions, the universal validity of human rights was combined with a differentiation between 'civilized states' and other types of states or societies (such as 'barbaric states', 'savage communities', 'criminal states', 'nonage communities', or 'insane communities').¹⁰ Civilized states did have the responsibility of ensuring respect for universal values and could do so in a legal order that gave them corresponding special powers. In a similar fashion, adoption of the Rawlsian framework would necessarily lead to an expansion of a liberal Empire, or 'Empire's law'. In his critique of the way in which some contemporary scholars use Kantian morality in international legal discourse, Koskenniemi has argued that adoption of abstract universalism necessarily leads to expansionist politics:

Because reason (in contrast to preference) is universal, these commands enjoy universal validity. That is to say, every thinking person, State or people would choose them from behind a 'veil of ignorance' . . . It follows that a person, group, or State that does not share them is not only of another opinion (or preference) but has made a mistake about something that that person, group or State should think rational for itself too. Universalizability in theory leads automatically to expansion as practice.¹¹

Cosmopolitan scholars, however, have argued the opposite. They have argued that Rawls's theory takes the equality between states too seriously and ends up by defending principles of international justice that are very much like those defended in mainstream international law literature. Or, to put it another way, Rawls's theory of international justice is set aside as a body of rules 'for a vanished Westphalian world'.¹² Indeed, cosmopolitans have criticized *The Law of Peoples* as being 'unrawlsian', because its principles of international justice are so different from the liberal and egalitarian spirit of the principles of domestic justice. Their basic point of departure is that all human beings do belong to a single community, and that this shared community should be cultivated.¹³ Cosmopolitans also use Rawls's domestic original position, although in a radicalized form.¹⁴ Nationality is seen as just another 'deep contingency' (like genetic endowment, race, gender, and social class in

9. Ibid., at 92–3, 106.

10. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

11. Koskenniemi, *supra* note 10, at 490.

12. A. Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', (2000) 110 *Ethics* 697.

13. P. Kleingeld and E. Brown, 'Cosmopolitanism', *Stanford Encyclopedia of Philosophy* (2002).

14. C. Beitz, *Political Theory and International Relations* (1979); *idem*, 'Cosmopolitan Ideals and National Sentiment', (1983) 10 *The Journal of Philosophy* 591; T. Pogge, *Realizing Rawls* (1989); *idem*, 'Cosmopolitanism and Sovereignty', (1992) 103 *Ethics* 48; *idem*, 'An Egalitarian Law of Peoples', (1994) 23 (3) *Philosophy and Public Affairs* 195.

the domestic theory), one more potential basis of institutional inequalities that are inescapable and present from birth.¹⁵ And since there is no reason within Rawls's model to treat nationality differently, cosmopolitans propose a single global original position for the international domain in which every world citizen is represented, as an alternative to Rawls's version where only representatives of peoples are represented. The most important implication of this alternative set-up of the original position is that different principles of international justice would be chosen. The cosmopolitan principles of international justice would be more in line with Rawls's principle of domestic justice than would Rawls's own principles of international justice. For example, Rawls's conception of domestic justice defends an extensive catalogue of liberal rights, including the right of equal representation, democratic participation, freedom of speech, while the set of rights in his conception of international justice only defends a limited set of basic human rights, providing basic security and subsistence.

In this way, cosmopolitanism challenges both Rawls's theory and some assumptions underlying international law. The most obvious challenge concerns the principle of sovereign equality. While several international lawyers have spoken out against Rawls's distinction between different types of states, some cosmopolitans have argued for an even stronger differentiation. Thus, in his contribution to this issue, Kok-Chor Tan argues that Rawls sacrifices liberal rights and liberties to toleration in order to present a Law of Peoples that is also acceptable to decent peoples. Rawls argues that it would be disrespectful to nonliberal decent peoples and an infringement of the liberal principle of toleration if the Law of Peoples were to include more than the basic human rights. Tan replies that, given the way in which Rawls's theory is constructed, Rawls's priority of tolerance over the protection of liberal rights is misguided. After all, the Law of Peoples is presented as an extension to a Society of Peoples of a liberal conception of justice for a domestic regime. Therefore it should 'remain steadfast' in its liberal commitment to the protection of individual freedom and rights, for example of dissenting individuals in decent but nonliberal societies. Tan thus concludes that *even within* Rawls's own method of constructing the Law of Peoples, it ought to include an extensive catalogue of liberal rights, most probably implying that Rawls's Law of Peoples is unacceptable to decent peoples.

In a critical response Thomas Mertens questions the exclusion of decent but nonliberal peoples from the Society of Peoples. On the basis of a Kantian understanding of Enlightenment as a perpetual challenge, Mertens argues that cosmopolitans should take the notion of toleration more seriously. Tan and Mertens do not necessarily disagree about the fact that there is a tension within (Rawls's) liberalism between the emphasis on liberal rights and the duty of tolerance to nonliberal ways of political organization. They disagree which of the two values should prevail. Tan's cosmopolitan's interpretation emphasizes individual liberties and freedoms, useful to criticize actual practices and institutions, even those of liberal peoples, for example the practice of capital punishment in the United States.

15. Pogge, *Realizing Rawls*, *supra* note 14, at 247; for a similar claim see Beitz, 'Cosmopolitan Ideals', *supra* note 14, at 595.

Mertens's interpretation, following Locke and Spinoza, emphasizes toleration as the central value in Rawlsian liberalism and, consequently, defends an inclusive attitude towards nonliberal decent peoples.

A second cosmopolitan challenge to Rawls's Law of Peoples concerns the issue of socioeconomic redistribution. Central to Rawls's concept of domestic justice is the *difference principle*, claiming that income and wealth in a society are to be distributed equally unless an unequal distribution is to the advantage of the worst-off in society.¹⁶ In his extension of the principles of justice for domestic society to the Society of Peoples, Rawls abandons the strong egalitarian principle to support burdened societies – the internationally worst-off participants. The concept of international justice only includes a people's 'duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political regime'.¹⁷ Rawls argues that, unlike in the domestic case, inequalities in the international realm are not *ipso facto* unjust. Moreover, he does not primarily identify 'burdened' with lacking material resources, but, instead, with the lack of 'political and cultural traditions, the human capital and know-how and, often, the material and technological resources needed to be well-ordered'.¹⁸ Indeed, he asserts that no society is so deprived of natural resources that they would be unable to become well ordered were they to be rationally and reasonably governed:

The causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and co-operative talents of its members, all supported by their political virtues.¹⁹

Rawls only demands assistance for burdened societies in overcoming their unfavourable conditions, that is, in lifting them above a minimum threshold to be able to 'manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples'.²⁰ Thus assistance should primarily be focused on building a well-functioning domestic basic structure of society and its major social and political institutions.²¹ Of course, this might imply dispensing funds but also an emphasis on human rights, to force ineffective regimes to take the well-being of all their citizens into account.²²

Rawls thus presupposes a two-level conception of the international society, sharply distinguishing the domestic society from the international Society of Peoples.²³ On the domestic level, governments have a primary responsibility for the well-being of their citizens and the protection of human rights, while the system of international relations only provides a background against which domestic societies can function and co-operate. Cosmopolitans reject this two-level conception

16. Rawls, *supra* note 5, at 303.

17. Rawls, *Theory of Justice*, *supra* note 1, at 37.

18. 'Not all [burdened] societies are poor, any more than all well-ordered societies are wealthy'. *Ibid.*, at 106.

19. *Ibid.*, at 108.

20. *Ibid.*, at 111.

21. See for an elaboration of a Rawlsian emphasis on domestic institutions as the primary cause of the wealth of peoples M. Risse, 'What We Owe to the Global Poor', (2005) 9 (1–2) *The Journal of Ethics* 81.

22. Rawls, *supra* note 1, at 109.

23. C. Beitz, 'Social and Cosmopolitan Liberalism', (1999) 75 *International Affairs* 515.

of international society, and start from the assumption that 'every human being has a right to have his or her basic interests met, regardless of nationality or citizenship'²⁴ and 'that every human being has a global stature as an ultimate unit of moral concern'.²⁵

Thus in his contribution to this issue Thomas Pogge focuses on the globally worst-off individuals, the 2,735 million human beings living in our world today who lack safe food and water, clothing, shelter, basic medical care, and basic education. In his analysis of the causes of this severe poverty, he refutes Rawls's 'purely domestic poverty thesis'. Instead, he argues that poverty is caused by a global institutional order, consisting of international and supranational organizations such as the World Trade Organization, the International Monetary Fund, and the World Bank. Moreover, he asserts that only minor reforms of this institutional design are necessary to avoid this massive poverty, but that these reforms are 'blocked by the governments of the affluent countries, which are ruthlessly advancing their own interests and those of their corporations and citizens, designing and imposing a global institutional order that, continually and foreseeably, produces vast excesses of severe poverty and premature poverty deaths'. From these assertions, Pogge derives a negative duty of affluent societies and their citizens not to contribute to the imposition of this unjust institutional order, and to support structural reform towards a more just global institutional order.

Finally, Simon Caney's contribution to this issue discusses global environmental problems. This is an issue that has not been discussed in Rawls's *The Law of Peoples*, but which has become a dominant topic in current international law and international relations. As mentioned above, Rawls emphasizes domestic institutions, thereby ignoring possible border-crossing effects of domestic activities, for example climate change caused by (domestic) human activities. Caney examines what may be the fairest way of dealing with global climate change.

24. C. Jones, *Global Justice: Defending Cosmopolitanism* (1999).

25. T. Pogge, *World Poverty and Human Rights* (2002).